Atwood Mobile Products, Division of Atwood Industries, Inc. *and* International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, UAW, AFL–CIO. Case 26–CA–18006–2

September 30, 1998

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

On June 24, 1998, Administrative Law Judge Nancy M. Sherman issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Atwood Mobile Products, Division of Atwood Industries Inc., Greenbrier, Tennessee, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Michael W. Jeannette, Esq., for the General Counsel.
Brian Lapps, Esq., of Nashville, Tennessee, for the Respondent.
Ms. Martha Poston, of Lebanon, Tennessee, for the Charging Party.

DECISION

STATEMENT OF THE CASE

NANCY M. SHERMAN, Administrative Law Judge. This case was heard before me in Nashville, Tennessee, on December 8, 1997, pursuant to a charge filed on April 8, 1997, and amended on June 16, 1997, and a complaint issued on June 23, 1997, and amended on December 8, 1997. The complaint in its final form alleges that Respondent Atwood Mobile Products, Division of Atwood Industries, Inc. violated Section 8(a)(1) of the National Labor Relations Act (the Act) by maintaining and communicating to employees a policy requiring them to keep disciplinary matters confidential; and violated Section 8(a)(1) and (3) of the Act by discharging employee Marcia Williams because she violated that policy, because she engaged in concerted activities, and because of her activity on behalf of International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, UAW, AFL–CIO (the Union).

On the entire record, including the demeanor of the witnesses, and after due consideration of the posthearing briefs filed by counsel for the General Counsel (the General Counsel) and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION AND THE UNION'S STATUS

Respondent is a corporation with an office and place of business in Greenbrier, Tennessee, where it manufactures and sells stoves and ranges for recreational vehicles. During the 12-month period ending May 31, 1997, Respondent sold and shipped from that facility goods valued in excess of $50,000 directly to points located outside Tennessee. I find that, as Respondent admits, Respondent is engaged in commerce within the meaning of the Act, and that assertion of jurisdiction over its operations will effectuate the policies of the Act.

The Union is a labor organization within the meaning of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Williams' Union Activity

In August 1996, employee Marcia Williams telephoned union organizer Martha Poston and asked her how to go about getting a union at Respondent's Greenbrier plant. Thereafter, and until the Union lost an NLRB-conducted representation election on January 22, 1997, Williams acted as Poston's lead contact with Respondent's employees. Poston spoke to Williams on almost a daily basis to find out if there were rumors going around the plant, if Poston needed to address particular matters to the employees, and if the employees had any questions. Williams attended all of the union meetings conducted by Poston. Between November 1996 and the January 1997 election, Williams wore a union T-shirt to work, usually without anything to cover the union logo on it, and also wore union hats, buttons, and stickers. Also, she campaigned for the Union among her fellow employees, and acted as the Union's observer at the election.

Every Monday morning, Ron Nitz, who is the general manager of the Greenbrier facility and is admittedly a supervisor, conducts a meeting of all the employees on the first shift, to which Williams was assigned at all times relevant here. At some or all of these Monday meetings during the union election campaign, Nitz urged the employees to vote against the Union. Also, during the election campaign, Respondent conducted smaller employee meetings which Nitz usually attended, and at which antiunion films were shown. At least during the Monday meetings, Williams at least sometimes stayed in the back of the crowd, and she at least usually made no remarks when subjects other than the Union were discussed. However, when Nitz brought up the Union, she would move to the front row and would frequently dispute what she regarded as incomplete or inaccurate statements.

During the union campaign, on a date before early January 1997 but not otherwise shown by the record, Relda Shepherd, who at one time had worked for Nitz when he was assigned to Respondent's plant in Rockford, Illinois, and who is the president of a UAW local which represents Respondent's employees at that plant, told a group of Respondent's Greenbrier employ-

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderence of all the relevant evidence convinces us that they are correct. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] Member Hurtgen notes that the facts in this case do not present the issue of whether an employee's secretly taping a discussion with management concerning discipline constitutes protected activity. The Respondent did not claim that its further discipline of employee Williams was motivated by *any* such taping.

ees, including Williams, that "Atwood in Greenbrier" had made $40 million in profit. During one of Nitz' Monday meetings with employees during the union campaign, Williams repeated this assertion. Nitz asked her to repeat this statement. When she did so, Nitz asked her where she got her information, and pointed out that during the preceding Monday meeting, he had told the employees that the projected sales of the Greenbrier plant were only $19 million. Williams said that she had proof, and that it would be forthcoming. He asked that if the proof did not come, she stand up at an employee meeting and apologize for "lying" about Greenbrier profits. She said that she would. She never received any proof, and never apologized. During a conversation with Nitz on March 20, 1997, the day Williams was discharged, Nitz referred to Williams' statement as having been made during the union campaign, and displayed knowledge that Williams had attributed the $40 million figure to "Relda." During this March 20 conversation with Williams, Nitz said that "Relda" had denied making such a comment, and further stated, "You know you made that whole big comment in front of everybody, . . . and I never brought it up after that."

B. Respondent's Written Rules and Written Disciplinary Policy

A document distributed to all employees, which is entitled "Atwood Greenbrier Operations/Basic Working Information," states, among other things:

> . . . .
>
> The following are the type of infractions which may lead to disciplinary action:
>
> . . . .
>
> 2. Unauthorized absence from assigned work station, excessive tardiness and absenteeism (see attendance policy. . .
>
> . . . .
>
> 4. Harassment of an employee.
>
> . . . .
>
> 8. Fighting, horseplay or disrupting the work place.
>
> . . . .
>
> 11. Insubordination.
>
> [Respondent] uses a four step disciplinary procedure: Verbal warning, written warning, three day suspension and termination. Depending on the seriousness of the violation, any step [may be] skipped all the way to termination.

Respondent follows a practice of documenting "verbal warnings" and asking the employees to sign them. Respondent's written attendance policy states, among other things (emphasis in original):

> An absence will be defined as a time away from the plant but not including . . . court appearances or extended medical leaves. If an individual is out more than one day in a row due to illness, this will count only as one absence. . . . If an employee needs to go to school for a child, or see a doctor and is gone less than four hours, then it will not count as an absence or as being tardy. However, in such circumstances, an employee should get an excuse from the school or doctor. Failure to bring your excuse from the doctor or from school will cause the individual to be counted as tardy. This will be allowed twice per quarter. Any instance over two will be counted as an absence.
>
> Therefore, if an employee is absent twice within the first quarter of the year, they will be given a verbal warning. If the employee is absent 4 times within the first six months, they will be given a written warning. Being absent 6 times by the end of the third quarter of the year will result in a written three day suspension. Any time an employee is absent eight times, they will be terminated.
>
> *EVERY FOUR TIMES TARDY EQUALS ONE ABSENCE.*
>
> *THE FOUR HOUR RULE WILL ONLY BE ALLOWED TWO TIMES PER QUARTER. ANYTHING OVER TWO TIMES PER QUARTER WILL BE COUNTED AS AN ABSENCE.*

C. Williams' Conduct and Discipline Before 1997

Williams began working for Respondent in March 1992. At all times relevant here, she worked in door assembly on the day shift.

In May 1993, Williams received a verbal warning for absenteeism and tardiness. In May 1994, she received a verbal warning for excessive absenteeism and tardiness. In August 1995, she received a verbal warning on the ground that she had "Walked out; didn't clock out; failed to inform her supervisor that she was leaving."[1] As to this incident, she apologized to Nitz, and explained that she had failed to clock out, when leaving the plant for the day at lunchtime, because of being distracted by having just found out from her youngest son's school that he wanted her to take him that day to the funeral of a little boy who had been accidentally killed while a guest at her home.

The parties stipulated that Respondent has a policy that write-ups last for a period of 1 year, after which they are not relied on for future disciplinary action. Moreover, Respondent's counsel stated on the record that Williams' May 1993 discipline was not a basis for her allegedly unlawful March 1997 discharge, because the May 1993 discipline was more than 1-year old.

Inspector Faye Crabtree, who was eligible to vote in the January 1997 representation election, testified that in June 1996, after Nitz had banned radios, Williams walked around the plant for several days with earphones and no radio. In view of Williams' credible testimony that she did not own any earphones, and for demeanor reasons, I do not credit Crabtree's testimony in this respect. Crabtree further testified that for more than a year (she did not otherwise give any dates), Williams had a sign up in her work station, "Welcome to Hell." Nitz testified that such a sign was in Williams' area, but he did not know whether she was the one who put it up. Williams was not asked about this matter. Respondent has not contended that any of the matters referred to in this paragraph was a reason for Williams' discharge.

About late October or early November 1996, Williams went to the office, where she may have had some business, without notifying her immediate supervisor, Donece Dickey, who looked for Williams for 45 minutes. About December 1996, expediter Scott Ellis told Dickey that Williams had been absent from her work station for 15 or 20 minutes and had been talking to some men in the quality assurance office.[2] When Dickey approached Williams in the quality assurance office, she was talking to a man in that office and gave an obviously false, job-related explanation for being there. Also, she delayed in complying with Dickey's instructions to return to her work station.

[1] All of the warnings described in this paragraph were issued to her under her then surname of Shutt.

[2] Dickey's testimony that Ellis so advised her was not received to show the truth of the report.

Respondent has not contended that either of these incidents was a reason for Respondent's decision to discharge her on March 20, 1997.

D. Discipline Received by Williams in 1997 Before her March 20, 1997 Discharge

1. Introduction

The General Counsel stated on the record that none of the warnings which Williams received prior to March 20, 1997, was unlawful.

2. The excessive-noise/duct-tape incident

On January 9, 1997, Williams, employee Lisa Rippie (who is Williams' sister), and employees Della Darden and Diane Witt engaged in conversations while all of them were actively working. Darden's (and, perhaps, Witt's) work station was separated by an aisle from Williams' and Rippie's work station, and the machinery in the shop was making noise. All four of these employees were talking equally loudly. An undisclosed number of the other employees complained to production supervisor Dickey, who was all these employees' immediate supervisor, that "they're being awfully noisy down there"; Dickey testified that "they were, I had heard them." Dickey thereupon went to the small assembly line, because it was closer than the other, and asked "them" (this did not include Williams or Rippie, who worked on another line across the aisle) to "quieten down." One of the temporary employees on the assembly line then whispered to Dickey, "[I]f they don't be quiet I'm going home . . . I've got a headache." Then, Dickey went to Williams and Rippie, who were working on another assembly line across the aisle, and told them to quiet down because other employees were complaining. For reasons not clear in the record, Williams did not hear these instructions. During the next break, Rippie told her that Dickey had told them to "shut up." At the end of the break, Williams put two strips of duct tape on her mouth. She continued to wear the duct tape for about an hour or an hour and a half, until either the next break or the end of the shift.[3]

Dickey made a report about the January 9 incident to her immediate supervisor, plant manager Gary Roberts, who made a report about this incident to his own immediate supervisor, General Manager Nitz. There is almost no direct evidence about what Dickey told Roberts or what Roberts told Nitz.[4] After testifying as a witness for the General Counsel, Nitz, who at the time of the hearing was still in Respondent's employ as the general manager at Greenbrier, testified as follows in response to questions on cross-examination by Respondent's counsel:

> [As to] the January 9th incident . . . I had instructed Mr. Roberts to have Ms. Dickey issue a verbal warning to those that were shouting and acting in an inappropriate behavior . . . I did not instruct Ms. Williams to be disciplined for the fact that she was shouting. On the contrary, the fact that she put duct tape over her mouth, which was a blatant disrespect for management. I mean, you know, she was told to be quiet and so what does she do, she puts duct tape over her mouth and wears it there for most of the day. That, to me, was just mocking the management decision to tell her to be quiet.

When Respondent's counsel then asked whether putting the duct tape over her mouth violated any work rules, Nitz testified:

> I would say it was kind of mocking the fact that—actually, I'd say yes, probably insubordination. That was the ultimate act of being insubordinate to her supervisor.

Nitz went on to testify that he instructed Roberts to give Williams a "verbal warning" for putting duct tape on her mouth; "It wasn't a serious act. . . . If it was a serious insubordinate act it would have been something other than a verbal warning."

Dickey credibly testified that thereafter, Roberts told her to "write them up for that." So far as the record shows, no employee other than Williams was involved in the duct-tape matter. Respondent uses personnel forms which call for written entries after "Verbal Warning Date" and "Reason." The record contains such a form documenting a verbal warning from Dickey to Darden (with a notation that Darden refused to sign it) dated January 9, 1997, for "Disturbing work force—Cursing management, behavior unacceptable in work environment." This warning aside, none of the participants in this incident ever received a documented warning therefor, so far as the record shows. As to Williams, Dickey credibly testified that Roberts told her that Nitz had issued instructions to "give her a verbal." Dickey further testified that later that day or the next day, she told Roberts that she had not issued a warning to Williams because of the January 9 incident, but had "just documented it"; and that he had told Dickey that this was "okay." I credit this testimony so far as it goes. However, such testimony leaves unexplained the fact that this documentation, which consists of her own notes, names only Rippie and Williams. There is no evidence that Respondent in any respect documented Witt's participation in this incident.

So far as the record shows, Nitz was not advised until the day of Williams' discharge (March 20, 1997) that no such write-ups had been issued (see infra, part II,E,2). Williams did not find out about the documentation prepared by Dickey until March 20, 1997, the day Williams was discharged.

3. The January 28, 1997 threat to Dickey

On January 27 or 28, Williams heard "through the grapevine" that Rippie was "mad" at Dickey because after Dickey had responded to Rippie's repeated requests for overtime work on Saturday, January 25, by telling her that nobody was going to work on January 25, an employee junior to Rippie had in fact worked that Saturday. On January 28, when Williams was coming down from the breakroom, she chanced to encounter order entry clerk Mary Jane Gibson, who asked how "you all" were doing. Inferring that Gibson was referring to the union adherents' reaction to the Union's election loss, Williams replied, "[W]e were keeping our heads up and our chins up . . .we

[3] My findings in this paragraph are based on a composite of credible parts of Williams' and Dickey's testimony and Dickey's memorandum to her own personal file. The inconsistencies in the evidence are immaterial to the issues in this case. In view of the probabilities of the case, I do not accept Dickey's testimony that Williams wore the tape on her mouth until "after afternoon break;" Dickey's notes state that Williams wore it "until afternoon break." Nor do I credit Williams' testimony that she put duct tape on her mouth in order to make sure that she would not talk to anybody.

[4] At the time of the hearing, Dickey was no longer in Respondent's employ, for reasons not shown by the record. She testified for the General Counsel, but her testimony about the January 9 incident was elicited by questions (not objected to) on cross-examination by Respondent's counsel. At the time of the hearing, Roberts was still employed by Respondent as its plant manager, an admitted supervisor, but he did not testify.

were doing fine." Williams further said that Rippie and Dickey "had gotten into it about the overtime," and that Rippie had been written up.[5] Williams said that she or Rippie was going to "get" or "stomp" Dickey (see infra, fn. 6).

After this conversation ended, Gibson went into the office, sat down at her desk, and resumed work. A few minutes later, when Dickey came into the office, Gibson said that Williams had told her that Williams or Rippie was going to "get" or "stomp" Dickey.[6] Dickey then went to Nitz and told him that Williams "seemed to be threatening [Dickey] with bodily harm."[7] Before meeting with Williams later that day, Nitz asked Gibson what Williams had said, to which Gibson replied that Williams said she was going to "stomp" Dickey.

Later that day, Williams was called by Dickey into Roberts' office. When Williams entered the office, she encountered Nitz, who closed the office door, and Roberts. Dickey was not there. Nitz asked Williams whether she had threatened Dickey. Williams said no. Nitz said that he had a witness who said that she did. He stuck his head out the door, and Gibson walked in. She did not look at Williams, but kept looking down. Nitz asked Gibson whether she had heard Williams threaten her supervisor. Gibson said yes. Nitz looked at Williams, said, "There's your witness," and told Gibson she could leave. Then, he said that Respondent took the threat seriously and was going to give Williams a written warning for it. He gave her a form captioned "Employee Write Ups" which had been filled out before Williams entered the office. This form contains blanks after, respectively, (1) the printed words "Verbal Warning Date:," (2) the printed words "Reason," and (3) the printed words "1st Writeup Date & Reason." The following hand-printed words are in the blank after "1st Writeup Date & Reason": "Making [verbal] threat against supervisor to Another Individual. Any Future threats will Result in Termination." Williams signed the slip.

Then, Nitz said that since the Union had lost by 6 or 7 votes, "now we need to settle down, get back on track, and . . . get back to work." He asked Williams to use her influence to get the people out there back doing their job and basically settle down. She said that she had no influence over what anybody thought.[8]

4. The February 14, 1997 incident regarding the "T" notation on Williams' timecard

On Monday, February 10, 1997, Williams took some time off either to take her young son to the doctor, or to go to court in connection with a claim against her ex-husband for child support.[9] On returning to the plant, she gave Dickey a note, from the doctor or an office connected with the child-support proceeding, explaining Williams' absence from the plant. During the afternoon break on February 14, Williams noticed that for the day of February 10, a "T" had been written on her timecard, an entry which she interpreted as meaning an unexcused tardiness. As she was returning from her break, she encountered Dickey. Williams angrily asked Dickey why she had put a "T" on Williams' time card. Dickey said that this entry did not mean that Williams' absence was excused or unexcused, but that Dickey just used this entry for tracking purposes.[10] Williams put up her finger and said that no such entry had been put on the card of another employee whom Williams named. Dickey told Williams to get out of Dickey's face, and walked off; Williams returned to work.[11] Later that day, Dickey issued Williams a "verbal warning," which Williams refused to sign, stating, "Insubordination. Pointing finger in Supervisor's face & yelling at her."

E. Williams' Allegedly Unlawful Discharge on March 20, 1997

1. Williams' action in leaving the plant early on March 14, 1997, with sore wrist

About early February 1997, Williams began to experience periodic pain in her right wrist (which she sometimes testimonially described as her right arm). During the week beginning March 10, her wrist "really bothered" her; and because of the pain she was up all night on the night of Thursday, March 13. She reported to work as usual on the morning of March 14, and worked for a while; but her wrist pain continued, and she decided to go home to see if she could get some sleep and to get her wrist to ease. She approached Dickey, told her that Williams had been up all night with her "arm" and that it was really hurting that morning, and said that she wanted to go home to see if she could get some sleep and get her "arm" to quit hurting. Dickey asked whether Williams thought her physical problem was work related; Williams said yes, that she thought the pain resulted from the way she held the air driver (a tool which she used in the course of her work), and that she had had the problem before. Dickey took Williams upstairs and brought

[5] No such writeup appears in the record.

[6] My finding as to what Gibson told Dickey is based on Dickey's testimony, which was corroborated by Gibson except that she could not recall whether Rippie was mentioned. Dickey's and Gibson's testimony in this respect was offered and received without limitation or objection. My finding as to what Williams in fact told Gibson is based on the testimony as to what Gibson told Dickey about the conversation and on inferences from Williams' credible testimony as to her understanding about an at least alleged prior disagreement between Dickey and Rippie. See *Fredericksburg Glass & Mirror*, 323 NLRB 165, 171–172 (1997); Rule 801(d)(1)(A)(B) of the Federal Rules of Evidence. To the extent inconsistent with my findings in the text, I do not credit Williams' version of her conversation with Gibson. Nitz testified that at Williams' unemployment compensation hearing, she "made the statement like, okay, I did say I stomped the hell out of [Dickey] or I was going to stomp the hell out of Ms. Dickey. Words to that effect." There is no evidence or claim that Williams ever physically attacked Dickey.

[7] This finding is based on Dickey's testimony. Nitz testified that Dickey told him that Gibson had told her that Williams had told Gibson that Williams would "get" Dickey.

[8] My findings as to the conversation during the January 28 meeting are based on a composite of credible parts of the testimony of Williams, Nitz, and Gibson. After considering the witnesses' demeanor, and in view of Respondent's unexplained failure to call Roberts as a witness, I do not credit Nitz' and Gibson's testimony that she repeated in Williams' presence what the alleged threat was.

[9] At the December 1997 hearing, she testified to the doctor's-visit explanation; during a March 20, 1997 conversation with management, she gave the court-attendance explanation. Because the latter explanation was given closer to the event, I am inclined to regard it as more accurate. However, the reason for her temporary absence that day has little or no relevance to the instant case. See infra, fn. 12.

[10] Dickey testified, however, that at least when she first started to work for Respondent as a supervisor in mid-December 1996, she would mark the employee's card with a "T" if the employee was tardy, and with an "LR" if the employee left early in the day and then returned. It is unclear from the record whether on February 10 Williams' errand caused her to start work late, or to absent herself from the plant for a period which fell within her regular working hours.

[11] My findings as to this incident are based on a composite of credible parts of the testimony of Williams and Dickey.

out an accident report form which they filled out. Then, Dickey asked Williams if she wanted to go to the doctor. She said that she would go if Dickey wanted her to. Dickey said that since Williams' physical problem was work related, maybe she should go. Williams said that she guessed she would, but did not know what doctors or clinics the employees could use for which Respondent would pay. Dickey named three doctors to whom Respondent sent employees whose injuries might be covered by workmen's compensation, including a doctor whose office was located in a clinic, Columbia Care, which was on Williams' way home. Williams told Dickey that she would go to Columbia Care. Dickey told her to go downstairs to the office and get from Debbie Dowlen the documents which Williams would have to give to Columbia Care.

Williams then proceeded to the main office, from which Dowlen was temporarily absent. Williams told employee Shirley Jones, whose desk is near Dowlen's desk, that Williams had been up all night with her "arm" and was going to the doctor. Jones gave her a note to take to the doctor. Williams then returned to her work station to pick up her jacket, her purse, and some personal effects. She asked Rippie whether Williams had to clock out; Rippie said that she did not know. Williams looked around for Dickey, but did not see her. Then, Williams returned to the office and asked whether she needed to clock out. Dowlen, who had just returned to the office, said no, if this was the first time Williams was going to the doctor. Without clocking out, Williams drove to Columbia Care.

The doctor at Columbia Care X-rayed Williams' arm, gave her an arm brace which he told her to wear about 16 hours a day, told her not to lift over 5 pounds (a limitation which would have prevented her from performing the job she had been performing before she went to the doctor), and set up a subsequent appointment for March 21. She asked him for a note; he said that he could not give her one. She said that she was going home; he said that he could not give her a note to go home. She said that this was all right, that before leaving she had told Dickey that Williams was going home.

Having heard nothing from Williams, shortly after the lunchbreak Dickey telephoned Dowlen and asked whether she had heard anything. Dowlen said that according to the Columbia Care doctor, Williams had stayed only a short time at Columbia Care, and he had told her that she could come back to work, that he could not okay her to stay out all day. Also, Columbia Care sent a fax message to Dowlen stating, "We told Mrs. Williams we (Columbia Care) could not give her the day off, but she said, 'I don't care what you say, I am going home now.'"

On Monday, March 17, Dowlen telephoned Nitz, who was out of the office, and told him that on March 14 Williams had requested to see the doctor, Respondent had sent her to the doctor, and she had not come back that day even though she was still punched in. He asked why she had failed to return to work that day; Dowlen replied that she did not know. Nitz testified that because of Respondent's work rule which forbids unauthorized absence from the work place, and because his absence from the office prevented him from investigating the facts thoroughly, he told Dowlen to suspend Williams "until my return, pending the results of the investigation. If the investigation . . . . would have proved in favor of Ms. Williams, she would have been given backpay for those days." He testified that he did not recall whether at that time he discussed Williams with Dickey, and there is no evidence that he did so. When Williams reported to work on Monday, March 17, she was advised to see Dickey in her office. When Williams came to Dickey's office, Dickey told Williams that Respondent had been having problems with her, such as disciplinary actions, insubordination, threatening to hit her supervisor, and not returning to work or reporting in on Friday although she had been released to work. Williams said that she had told Dickey on Friday that Williams wanted to go home. Dickey said that there was every indication that Williams was not and did not want to be a team player; and, accordingly, she was being suspended until further notice. Dickey told her to call if she had not heard from Respondent by Friday.

On the following day, Williams received a registered letter from Dowlen, dated March 17, directing her to report back to work on Thursday, March 20, and to meet with Nitz and Dickey in his office before beginning work on the day. March 20 was Nitz' first day back at the office following an absence which began no later than March 14.

2. Williams' taped interviews with management and her allegedly unlawful discharge

Before the beginning of the workday on March 20, Williams asked her sister, employee Lisa Rippie, to listen to a tape recording of some statements which Williams' daughter had made on the telephone. Williams had inserted this tape into a tape recorder which she had brought to her work station (next to Rippie's work station) in an open bag which Williams referred to as her "wag bag" and which she frequently brought to the plant in addition to her purse. As previously noted, Dowlen's March 17 letter to Williams had stated: "Prior to beginning work, please plan to meet with Mr. Ron Nitz and Ms. Donece Dickey." Before proceeding to the office area, Williams removed from her tape recorder the tape of her daughter's remarks, inserted a blank tape, and put the tape recorder in her shirt pocket. Although she testified that she was not trying to hide the tape recorder and there is no specific evidence otherwise, I infer from management's subsequent conduct that initially, they were unaware of her use of the recorder. Then, Williams proceeded to Nitz' office and turned on the recorder.

Present during that conversation were Williams, Dickey, and Nitz. Nitz began the interview by reproaching Williams for going home on March 14 after her doctor's appointmenteven though they didn't excuse you from work." Williams said that before leaving the plant, she had told Dickey that Williams was going home. Williams went on to say that Dickey had asked her if her problem was work related; and that Williams had said yes and that her "arm" had been bothering her since late January or early February. Williams went on to describe her inquiries, before she left the plant on March 14, about whether to clock out. Nitz said, "[W]hen the doctor tells you that . . . they can't give you the day off that means that you have to return back to work, that's why you didn't punch out is because you got hurt, you go on company time and you have to come back if the doctor tells you to do this." Williams said that Respondent could legitimately dock her for the rest of the day, and that the doctor's report showed when she got there and when she left. Nitz said that Williams had "some responsibility"; that if the doctor said that she could come back to work, she should be coming back to work; that the doctor had not given her the day off; and that Williams had an attendance problem. Williams asked how she had an attendance problem. Nitz asked whether she had not already received a verbal warning. Williams asked,

"For what? Every time I have left I have come back or I have brought a note." Nitz said that Williams "was only allowed so many notes in a quarter," and Dickey said that Williams was "only allowed two excuses per quarter."[12] Nitz went on to say that Williams had been given "a lot of slack" and "basically what we are seeing is a general decline in your attitude around here." Nitz said that Williams had

> been written up on the 9th of January for disrupting the department for loud yelling and talking to [Dickey] in [an] insubordinate manner, when you were talked to about causing a disturbance.[13] On January 28 you were given a verbal, you were given a writeup for a verbal threat against [Dickey] when you told another employee that you would get [Dickey.] On 2/14 you were written up for insubordination for pointing a finger at [Dickey's] face and yelling at her. There are two insubordination causes that should have led to your termination already. Now your failure to report back to work. I would classify that as a decline in your attitude toward us.

Nitz went on to say that he was "really ticked off last week" by a sign which Williams had posted at her work station saying, "Tell me again how lucky I am to work here, I keep forgetting." Williams said that the sign had been up for a year, that she had received it from her parents as a gift, that she and everyone else who had mentioned it to her thought it was funny and cute, and that she had taken it down as soon as Nitz asked her to.[14] Nitz said that he had asked her to take it down because his own supervisors had complained about it, and that if the "attitude" reflected in the sign was her kind of attitude, that was the kind of attitude he was complaining about. Williams said that on the occasion (February 14) she had admittedly been written up for insubordination, when she asked why there was a "tardy" on her time card Dickey had not explained the entry but, instead, had told her to get out of Dickey's face. Dickey denied saying this, whereupon Williams accused her of lying. At Nitz' request, Williams gave him the name of another individual (who did not testify before me) who had at least allegedly overheard the conversation. Nitz said that he would talk to this at least alleged witness (his testimony indicates that he did not do so before discharging Williams, and there is no evidence that he ever did), but "even though you do your job you've got this attitude that has been deteriorating and it's really kind of distracting. . . . It's your general attitude toward the Company . . . you are going to have to improve [your attitude], you are going to have to maintain yourself here. You are going to have to watch your attendance. You are going to have to do everything, because if you don't, then it's going to mean your job." Nitz further said, "We have gone over the two writeups that you have had and that doesn't include the one for attendance." Williams said that she knew about only one writeup for insubordination—namely, the February 14 writeup on the occasion when Dickey allegedly told Williams to get out of Dickey's face. Nitz said that he had thought Williams had received a writeup on the occasion (on January 9) when she put duct tape over her mouth, but that as to this incident no writeup appeared to be in her file.

Reverting to the March 14 incident, Nitz said, "[W]e sent you to the doctor to determine what was wrong, and he determined that nothing was wrong with you, that you could return back to work." (Earlier during this conversation, Williams had told Nitz, "As far as I know [the doctor] still doesn't know what's wrong. I have to go back Friday," the following day.) Williams said that on March 14 she had intended to go home whether or not she went to the doctor, because she had been up all night with her "arm." Nitz said that she could make the determination whether to go home at her will, but he could make the determination whether he wanted her to be an employee any more. Williams asked whether Nitz had ever known her to lie to him. He said yes, and "Let's go back to the union campaign. You told everybody that we made 40 million dollars here and that was a lie." Williams said that she had received this information from Relda and if it was wrong, Relda was the one who had been lying. Nitz said that Relda had told him that she made no such comment. Williams said she had a witness that Relda said this.[15] Nitz said, "then where is it? Where is the excuse? You know you made that whole big comment in front of everybody . . . and I never brought it up after that." Then, Nitz said, "How about another [lie?] How about the fact that you were telling everybody that [Respondent] bought my house for me?" Williams said that she had not told people that, although other people had told her that. Nitz said that people had told him that she had said that.[16] Nitz said that he was "going to have to rewrite this writeup.[17] You are going to be getting a writeup." Williams asked, "what for." He said, "for not coming back to work. That is like walking out of here. When the doctor says, 'I can't give you time off and you can return to work,' then that's just like walking off your job. If you don't keep your nose clean and your attitude in check then you are not going to be an employee here . . . very much longer . . . if you have any further attitude problem or anything like that your days at Atwood are numbered." At the end of this meeting, Williams returned to her work station, turned off her tape recorder, laid it in her "wag bag," and resumed work. Nitz credibly testified that after this conference ended, and before again meeting with Williams, he talked to Dickey. Inferentially during this same period, he talked to Dowlen. Be-

[12] As previously noted, on February 10, 1997, Williams had taken time off either to take her son to the doctor, or to go to court in connection with her efforts to obtain child support (see supra, fn. 9). The record otherwise fails to show how many, if any, absences or tardinesses were charged to her during the current quarter. Respondent's "Attendance Policy" at least arguably attaches different consequences to, respectively, "court appearances" and "need to go to school for a child, or see a doctor and is gone less than four hours [with an] excuse from the doctor or from school" (see supra, part II,B). However, Dickey's testimony (p. 92, L. 24 through p. 93, L. 14) suggests that for purposes of this policy, she equated "if they had to go to court," if "they had to get their children," and going to see a doctor.

[13] No such document was in her central personnel file or had been shown to her.

[14] Williams credibly testified that she took down the sign about early February 1997 at Dickey's request.

[15] Poston testified before me that Relda Shepherd had made such a statement in the presence of Poston and Williams. As previously noted, Shepherd was a president of a sister local of the Union; she may also have been a current employee of Respondent. She did not testify, nor was her absence explained. Nonetheless, for demeanor reasons I credit Poston and Williams.

[16] Williams' testimony is undenied that she had never said this. Nitz did not name the "people" who allegedly told him that she had been making such representations.

[17] Like my other findings with respect to what was said during this conference, this finding is based on Williams' tape recording. However, Nitz testified that at that time, he had nothing already written up for her.

fore the 9:45–55 a.m. break that morning, Dickey came to Williams and said that Nitz wanted to see them in his office after the break.

During the break, on returning to her job station immediately next to Williams' job station, Rippie observed Williams' open "wag bag" with the loaded tape recorder in view. In Williams' absence, but believing that this was the tape of Williams' daughter which Williams had asked Rippie to listen to, Rippie removed the tape recorder from Williams' bag, held it to her ear, and played part of the tape recording of Williams' conference with management earlier that morning. Then, Rippie returned the tape recorder to Williams' bag.[18]

At an undisclosed hour that morning, after at least the first conference between Williams and management that day, Williams told employee Crabtree, "I'm going to be doing better than anybody in this whole damn place. Because I just got everything on tape."[19] Thereafter, Crabtree saw Williams playing a tape and Rippie listening to it. Although (inferentially) this was the tape of remarks made by Williams' daughter, Crabtree erroneously inferred that this was the tape which Williams had described to Crabtree.

At about 10 a.m., Williams made sure that her tape recorder was loaded with the tape which she had used during the meeting with management earlier that day, and that the tape was set at a point where recording could be continued without erasure. She turned on the recorder, went to Nitz' office, and again recorded the conversation, which was attended by Williams, Dickey, Nitz, and Roberts. Nitz said that no writeup existed regarding the February 14 incident involving Dickey's "T" notation, but that because this incident "affects your attitude" he was going to leave it in a "Last Chance Agreement" which he gave to Williams for her signature. Then, he gave her the following document, addressed to Williams, which bears the typewritten and the handwritten date of March 20, 1997, and the signatures of Nitz, Dickey, and Roberts:[20]

> Over the past several months we have seen a steady decline in what can be generally categorized as your attitude, which is highlighted by a variety of events some of which have been documented, and all of which you have been made aware:
>
> 1–09–97 Disrupting the department with loud yelling and talking to Supervisor in an insubordinate manner when being counseled about the disturbance.
>
> 1–28–97 Verbal threat against Supervisor. Told another employee she would "Get [Dickey]."
>
> 2–14–97 Insubordination—Pointing finger in Supervisor's face and yelling at her.
>
> 3–17–97 Failure to return to work after a visit to a doctor who specifically told you to report back to work.
>
> There has been an obvious and continually increasing display of disruptive behavior that has harmed your whole work area and is requiring an inordinate amount of your Supervisor's time for counseling. This conduct will no longer be tolerated, and your recent suspension will serve as our last attempt to save your employment with Atwood. This document and discussion of same is your final warning. Your behavior must improve immediately and it must remain acceptable. Any further display of unacceptable behavior will force us to terminate your employment immediately.
>
> I understand that Atwood is giving me a "Last Chance" to improve my attitude and behavior, and that if my behavior does not remain acceptable, I will be terminated.

Williams refused to sign this document in the space calling for her signature. She returned to her work station, turned off her tape recorder, laid it in her "wag bag," and resumed performing her work.

After Williams' second conference with management that day, Crabtree told Dickey that Williams had taped "the meeting," that she was playing the tape, that Rippie was listening to it, and that Crabtree was pretty sure that an employee identified in the record as "Kay" (who did not testify) was listening to it.[21] Dickey thereupon immediately went to Nitz and told him that according to Crabtree, Williams had taped "the meeting" and was playing the tape, and that some of the employees were listening to it; he said that he might have to talk to the attorneys.[22] When Nitz spoke to Crabtree about the matter, Crabtree said that she had observed Williams and Rippie listening to a tape, but that Crabtree could not verify whether it was the tape in question or not. When Nitz asked Crabtree what Williams had said about the matter, Crabtree replied that Williams had said she had "got us" and had a tape recording of the meeting. Nitz did not ask Rippie about the matter.

A little before 11 a.m., Dickey told Williams that Nitz wanted to see her in his office. Williams again put the tape recorder in her shirt pocket, again turned it on, and again went to Nitz' office. Present during this conversation were Williams, Dickey, Nitz, and Roberts. Nitz said, "It has come to my attention that you recorded our conversation in here. That's an invasion of our privacy and I would like the tape." Williams replied, "I'm sorry, I was told to tape it." Nitz said, "I would like the tape." She said that she was not giving him the tape. Nitz thereupon told her that she was terminated, and told Dickey to escort Williams off the property. Williams said that her lawyer had told her to record the conversation and she had done what her lawyer told her to do. Then, Williams returned to her work area, gathered her personal effects, and left the plant.

Later that day, she told union representative Poston what had happened, and gave her the tape. After listening to it, Poston transcribed it. The testimony of Poston and Williams conflicts as to whether Williams had possession of the tape at any time between the time that Poston transcribed the tape and the time when Poston gave it to the Board's regional office. However, there is no evidence that the tape was tampered with before it was received into evidence at the hearing on December 8, 1997.

Williams' personnel file contains the following memorandum from Nitz dated March 20, 1997:

[18] My findings in this paragraph are based on a composite of credible parts of Williams' and Rippie's testimony.

[19] My finding that Williams made this remark is based on Crabtree's testimony. For the reasons set forth infra fn. 23, I do not credit Williams' denial.

[20] The document in the exhibit folder appears to be a photocopy of a document whose original was typewritten. For reasons unexplained in the record, the photocopy includes the following material at the top: "Mar–18-97/Tue/15:45/Atwood Mobile Products/Fax No. 8156545642/ p. 01." Cf. Supra, fn. 17.

[21] My finding that Crabtree so reported to Dickey is based on Dickey's testimony, which I credit for reasons explained infra, fn. 23. According to Crabtree, she told Dickey that Williams "got everything on tape."

[22] This finding is based on Dickey's testimony, which I credit for the reasons set forth infra, fn. 23. According to Nitz, Dickey said that Williams had tape-recorded the 10 a.m. meeting.

This morning I brought Marcia Williams into my office, along with Donece Dickey, her supervisor, and Gary Roberts, the Plant manager, in order to discuss [Williams'] continued disruptive behavior, and inappropriate attitude. I read the written warning to [Williams] and explained that due to her continued inappropriate behavior and attitude, this meeting would serve as her final warning. [Williams] claimed that she did not have an attitude problem. I gave her several examples that [led] the company to the opposite conclusion:

1. When she was told to be quiet and stop disrupting the plant in January, in a juvenile-type fashion, she put tape over her mouth and mocked her supervisor.

2. She threaten[ed] her supervisor to another employee and was written up for it. She signed this disciplinary action.

3. She waved her finger in the supervisor's face and was insubordinate upon being reprimanded.

4. She said she has never lied, but was reminded of the statement she made about the company making $40,000,000 profit. This was an obvious lie and could be proven. She also told other employees that Atwood had bought both my and Jeff Sear's homes. Another outright lie.

I explained to her that these examples of conduct, in conjunction with her failure to correct prior disciplinary problems and her failure to return to work after visiting the doctor, who specifically informed her that she could return, were the reasons that she received a three-day suspension, and were the reasons that she received this final warning.

At the end of the meeting, I asked [Williams] to sign the final written warning, but she refused. This was noted and witnessed by [Roberts] and [Dickey].

At 10:45 a.m., [Dickey] learned that [Williams] had secretly tape recorded the earlier meeting and was now playing the tape on the production floor. I confirmed that [Williams] had indeed told an employee that she had tape-recorded the counseling session and that she had played the tape.[23] It is Atwood's stated policy that disciplinary matters are to be kept between the supervisor(s) and the employee. I consider this to be another example of her bad attitude, insubordinate behavior, inappropriate behavior and disrespect for Atwood management and Atwood policies. Due to [Williams] secretly tape recording this disciplinary meeting, I lost the remaining trust and confidence that I had left in [Williams].

At 11:05 a.m., I called [Williams] back into my office along with [Dickey] and [Roberts]. I asked [Williams] whether she had tape-recorded our previous conversations of this date, and she acknowledged that she had. I explained that I felt this was an invasion of privacy and asked her to give me the tape. She refused to do so, stating that a lawyer had told her to make the tape recording. I explained that I had no choice but to terminate her in light of her failure to abide by the spirit and letter of her final warning. I then asked [Roberts] and [Dickey] to escort her out of the plant and off of Atwood Property.

Williams credibly testified that she had taped the three March 20 conversations "To cover my own butt." As to why Nitz decided to terminate Williams, he testified:

> We didn't terminate her because she made the tape recording; we terminated her because I asked her for the tape recording and she refused to give it to me . . . I asked her to give me the tape recording [because] I wanted to verify for the fact what was being said during that meeting had not changed [sic]. The tape was in her [possession] for some time and tape recordings can be edited. So, when she refused to give that to me or give me the opportunity to listen to the tape that was an act of insubordination. So, that was basically the last act in a series of acts that violated the spirit of the last chance agreement. Her refusal, her insubordination, violated the spirit of that last chance agreement.

This testimony aside, neither the tape itself nor any other evidence indicates that he ever asked her if he could listen to the tape. He further testified:

> The tape clearly belonged to her . . . and . . . we have no rule against recording, but because she was recording my conversations and the conversations of my supervisors and plant manager, which I considered personal invasions of our privacy—whether it is or not I considered it that—that I wanted to have the access to the tape so I could at least get a copy of it.

Nitz never told Williams what he intended to do with the tape if she gave it to him. There is no evidence that he ever asked her for a copy or for permission to make one.

Williams never played the tape for anyone, and did not learn until after her discharge that Rippie had played it.[24] When asked whether he asked Williams what tape recording Williams was playing, Nitz said no, that

> It didn't matter what tape recording she was playing. She had already admitted to me that she had secretly tape recorded our meeting. . . . she was not fired for secretly tape recording the meeting, she was insubordinate by not turning the tape over to me and that was the last act in a series of acts that led to her termination.

When asked why he had not asked Rippie whether she had been playing a tape, Nitz testified, "[I]t was irrelevant to our topic at that point in time. . . . It was the fact that [Williams] would not turn the tape over."

F. Respondent's Policies as to Requiring Employees to Keep Disciplinary Matters Confidential

The complaint alleges, and the answer denies, that "Since about October 8, 1996 [6 months before the service of the charge; see Section 10(b) of the Act], Respondent has maintained and communicated to employees a policy requiring employees to keep disciplinary matters confidential." As previ-

[23] It is these two statements in Nitz' memorandum which have led me to credit (a) Dickey's testimony that she told Nitz that according to Crabtree, Williams had taped and was playing the conversation, and some of the employees were listening to it; (b) Dickey's testimony that Crabtree made a rather similar report to her; and (c) Crabtree's testimony that Williams told her about the tape. Although Crabtree's demeanor as a witness was unimpressive, her testimony that Williams told her about the tape, and that Crabtree believed she had seen Williams playing it on the production floor, is the only record explanation for Dickey's having learned about the tape and her belief that Williams was playing it to other employees.

[24] My findings in this sentence are based on Williams' testimony.

ously noted, Nitz' March 20, 1997 memorandum to Williams' file states, in part: "It is [Respondent's] stated policy that disciplinary matters are to be kept between the supervisor(s) and the employee." Moreover, in response to the charges filed herein (the amended charge alleges that Respondent discharged Williams for, inter alia, "violating an unlawful rule which prohibits employees from discussing disciplinary actions"), Respondent's counsel stated, "Discussing disciplinary matters is a violation of [Respondent's] policy requiring confidentiality of disciplinary matters." Nitz, who at all material times headed Respondent's management at the Greenbrier plant, testified that this was his policy, and not corporate policy; and that he had adopted this policy partly because employees had expressed resentment to him that disciplinary action directed at them was known to everyone on the plant floor, and partly because he wanted the employees to know that he would not discuss disciplinary actions and problems with other employees. Nitz testified that "[I]f an employee wants to discuss what had happened to him, that's their prerogative. Nobody has ever been written up for it. Nobody has been terminated for it." Nitz testified that sometimes, but not always, he had advised employees in private discussions of disciplinary actions that the employees are free to discuss among themselves the discipline which has been imposed on them.

G. Analysis and Conclusions

1. The restriction on discussion of discipline

As Respondent does not appear to question, an employer violates Section 8(a)(1) of the Act by forbidding employees to discuss their discipline with each other. *Stoody Co.*, 320 NLRB 18, 30 (1995); *Medeco Security Locks*, 319 NLRB 224, 227–229 (1995), 322 NLRB 664 (1996), enfd. in material part 142 F.3d 733 (4th Cir. 1998); *General Electric Co. v. NLRB*, 117 F.3d 627, 638 (D.C. Cir. 1997); *"The Loft,"* 277 NLRB 1444, 1461 (1986); *Fredericksburg Glass,* supra at 323 NLRB 165, at 171–172. Respondent's maintenance of such a prohibition is shown by Nitz' entry in Williams' file that Respondent had a "stated policy that disciplinary matters are to be kept between the supervisor(s) and the employees," and company counsel's reply to the amended charge (which alleged that Williams had been discharged partly for "violating an unlawful rule which prohibits employees from discussing disciplinary actions") that "Discussing disciplinary matters is a violation of [Respondent's] policy requiring confidentiality of disciplinary matters." Accordingly, I find that by maintaining such a policy, Respondent violated Section 8(a)(1) of the Act.

In so finding, I find unavailing the reliance of Respondent's counsel on Nitz' testimony that he maintained this policy in order to assure the employees that he would not discuss disciplinary actions against employees with their fellow employees; and that "if an employee wants to discuss [with other employees] what had happened to him, that's their prerogative." In the first place, Nitz' testimony in this respect is irreconcilable with his entries in Williams' file; more specifically, his entries stated that Williams had breached this policy by "playing the tape on the production floor" after herself taping the "counseling session" directed at herself. In the second place, Nitz by his own admission sometimes told employees that disciplinary action was to be kept between the employee and the supervisor without further telling employees that they were free to discuss such actions among themselves. Because employees who failed to receive such assurances could reasonably conclude that the prohibition extended to the statutorily protected conduct of discussions with each other, the policy as to them was not validated by Nitz' explanations to others. See *NLRB v. Miller*, 341 F.2d 870, 873–874 (2d Cir. 1965); *Laidlaw Transit, Inc.*, 315 NLRB 79, 82–83 (1994).

2. The discharge of employee Williams

As the Court of Appeals for the Sixth Circuit stated in *Architectural Glass Metal Co. v. NLRB*, 107 F.3d 426, 431 (1997):

> In *N.L.R.B. v. Transportation Management Corp.*, 462 U.S. 393, 397–398, 401–403 . . . (1983), the Supreme Court approved the Board's approach, established in *Wright Line*, 251 N.L.R.B. 1083 . . . (1980), to analyzing cases "involving charges of employment actions motivated by antiunion animus and employer protestations of legitimate reasons for the actions." *W.F. Bolin Co. v. NLRB*, 70 F.3d 863, 870 (6th Cir. 1995) (quoting *Birch Run Welding & Fabricating Inc. v. NLRB*, 761 F.2d 1175, 1179 (6th Cir. 1985)). First, the General Counsel must establish by a preponderance of the evidence a prima facie case that antiunion animus motivated or contributed, at least in part, to an employment action. *See Transportation Management*, 462 U.S. at 400 . . . ; *W.F. Bolin Co.*, 70 F.3d at 870; *NLRB v. Cook Family Foods, Ltd.*, 47 F.3d 809, 816 (6th Cir. 1995). If this prima facie case is established, then the employer can avoid being held in violation of sections 8(a)(1) and 8(a)(3) if it proves, also by a preponderance of the evidence, that the employment action "rested on the employee's unprotected conduct as well and that the employee would have lost his job in any event." *Transportation Management*, 462 U.S. at 400 . . ; *accord Cook Family Foods*, 47 F.3d at 816. This latter showing is regarded as an affirmative defense, and if the proffered business justification is deemed pretextual, the defense fails. *See W.F. Bolin Co.*, 70 F.3d at 873; *NLRB v. Vemco, Inc.*, 989 F.2d 1468, 1482 (6th Cir.), *amended by* 997 F.2d 1149 (6th Cir. 1993).

This rule of law is also applicable to allegations that an employee has been discharged or otherwise disciplined because of protected activity, in violation of Section 8(a)(1) of the Act, even though such employer action did not necessarily violate Section 8(a)(3). *Ajax Paving Industries v. NLRB*, 713 F.2d 1214, 1219–1220 (6th Cir. 1983); *United Packing Co.*, 271 NLRB 942 (1984), enfd. mem. 767 F.2d 932 (9th Cir. 1985); *Mr. Steak, Inc.*, 267 NLRB 553 (1983); *Bronco Wine Co.*, 256 NLRB 53, 54–55 (1981).

In the case at bar, Nitz' March 20 memorandum to Williams' file leaves no room for doubt that Respondent discharged Williams partly because of a perceived violation by her of Respondent's unlawful policy that disciplinary matters were to be kept between the employee and the supervisor—namely, because Respondent believed that she was playing to other employees a tape recording of what Nitz' March 20 memorandum characterized as her "counseling session." A discharge with this sole motivation would violate Section 8(a)(1) of the Act.[25] Nor

[25] See *Asociacion Hospital Del Maestro, Inc. v. NLRB*, 842 F.2d 575, 577–578 (1st Cir. 1988); *Miller*, supra, 341 F.2d at 874; *Crestfield Convalescent Home*, 287 NLRB 328 (1987); *A.T. & S.F. Memorial Hospitals,* 234 NLRB 436 (1978); *Scientific-Atlanta, Inc*., 278 NLRB 622, 625–626 (1986). There is no evidence or claim that Respondent

would a different result be suggested by the fact that Respondent was mistaken in the belief that Williams had played the tape on the plant floor.[26] Moreover, Nitz' March 20 memorandum leaves no room for doubt that Williams was discharged partly because of her inaccurate assertion, during Nitz' meeting with employees about early January, that Respondent had made $40 million in profits; Nitz' remarks to Williams on the day of her discharge show that he regarded Williams' assertion as having been made in the context of the union campaign. Where (as here) such remarks in that context were not made with knowledge of their falsity, or with reckless disregard of whether they were true or false, they constitute protected union activity even where (as here) they were factually mistaken. *KBO, Inc*., 315 NLRB 570 (1994), enfd. mem. 96 F.3d 1448 (6th Cir. 1996); see also *NLRB v. Cement Transport, Inc.*, 490 F.2d 1024, 1029–1030 (6th Cir. 1974), cert. denied 419 U.S. 828 (1974). Particularly because Nitz immediately told the employees who heard Williams' remarks that they were inaccurate and never brought the matter up again, and the Union lost the representation election a few weeks later and (so far as the record shows) did not continue or resume its organizing efforts,[27] I do not believe that such remarks became unprotected because Williams never publicly admitted their inaccuracy.

Nor has Respondent sustained its burden of showing that it would have discharged Williams even in the absence of her protected activity. Thus, on the morning of her discharge and before Respondent found out about the tape, Respondent issued her a warning—and not a discharge—on the stated basis of some of the incidents on which Respondent now relies as reasons for her discharge—namely, the January 9 yelling incident; her January 28 threat against Dickey; what the memorandum described as "Insubordination" on February 14 in at least allegedly pointing her finger at Dickey's face and yelling at her; and Williams' March 14 "Failure to return to work after a visit to a doctor who specifically told [her] to come back to work." Although the memorandum at least arguably suggests otherwise, Nitz testified that Respondent did not terminate her for tape recording her conversations with management (see supra, fn. 25). Moreover, although Nitz had obviously received before March 20 the inaccurate reports that Williams had inaccurately said his and another manager's house had been paid for by Respondent, there is no evidence that before March 20 he had even mentioned these reports about Williams to her, who promptly denied them. Except for the unlawful reasons for her discharge, the only remaining reason set forth in the March 20 memorandum is her refusal to give him the tape.[28] Respondent seems to be contending that it would in any event have discharged Williams for refusing to obey Nitz' order to give him the tape, because she was guilty of "insubordination" by refusing to surrender her own property (a tape made on advice of counsel, of conversations where all other participants were members of management) without receiving any explanation of what Nitz intended to do with it or whether he intended to return it in either altered or unaltered form; Respondent's written rules call for "discipline" for "insubordination";[29] and Respondent's written rules also call for "a four step disciplinary procedure: Verbal warning, written warning, three day suspension and termination." However, as to the year preceding her discharge (admittedly, the only relevant period), the only discipline in Williams' file before her discharge consisted of a written warning by Nitz which was not preceded by a verbal warning, a subsequent verbal warning, and the "Last Chance Agreement" (which she refused to sign) alleging, in effect, that she had been suspended between March 17 and 19 for "Failure to return to work after a visit to a doctor who specifically told you to report to work." Furthermore, Nitz testified that the reason for his March 17 order that Williams be suspended was that his absence from the office prevented him from investigating the facts thoroughly; and that he ordered her suspension, not for any specific length of time, but "until my return, pending the results of the investigation"; Dickey had told Williams on March 17 that she was being suspended until further notice and that she should call if 4 days elapsed without her hearing from Respondent; and Nitz testified that if his investigation "would have proved in favor of Ms. Williams, she would have been gives backpay" for the period of her suspension. Furthermore, his postdischarge memorandum to her file attributed her "three-day suspension" (which had lasted 3 days solely because Nitz returned to the office 3 days after ordering her suspension) to her March 14 failure to return to work after the doctor "specifically informed her that she could return"—conduct somewhat different from a failure to return after the doctor had "specifically told [her] to report to work" as described in the Last Chance Agreement. Moreover, as to other employees Respondent did not uniformly follow the disciplinary procedure as described in its written rules. More specifically, employee Jatanya Fort, after receiving a written warning in December 1996 (for threatening a coworker) and a verbal warning in February 1997 (for an unauthorized absence from her work station), received in March 1997 another verbal warning (and not a suspension) for an all-day absence and four tardinesses. Also, Respondent did not terminate Williams' father (possibly named James Rippie), when he went over Respondent's limit as to the number of absences allowed.[30]

For the foregoing reasons, I find that Respondent violated Section 8(a)(1) and (3) of the Act by discharging employee Williams.[31]

---

had any rule or policy against the playing of tape recorders on the production floor. As previously noted, Nitz testified that Respondent had no rule against the surreptitious tape recording of conversations, and that Williams' action in tape recording her conversations with management was not a motive for her discharge. Accordingly, and because the General Counsel does not renew in his post-hearing brief his contention at the hearing that Williams' action in this respect was itself protected by Sec. 7, I need not and do not address this issue.

[26] *Gulf-Wandes Corp.*, 233 NLRB 772, 778 (1977), enfd. in relevant part 595 F.2d 1074 (5th Cir. 1979).

[27] When asked at the December 1997 hearing, "Are you aware there's another campaign at Atwood to organize employees?", Nitz replied, "Not at this time."

[28] I need not and do not consider whether Respondent could lawfully have discharged her for this reason. See supra, fn. 25.

[29] I need not and do not consider whether Respondent could lawfully have discharged her for refusing to give him the tape. See supra, fns. 25 and 28.

[30] Williams' father had worn a shirt supporting the Union. The record fails to show whether he began this activity before or after the absences which exceeded Respondent's limit.

[31] As previously noted, the General Counsel conceded at the hearing that the warnings to Williams before March 20, 1997, were not unlawful. I find it difficult to square this position with the assertion in his posthearing brief (Br. 11) that "Williams received two writeups [on January 28 and February 14], a suspension [on March 17], and termination in less than two months after the [January 22, 1997] union election. The facts strongly infer [sic] that the Respondent embarked upon a

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has violated Section 8(a)(1) of the Act since October 6, 1996, by maintaining and communicating to employees a policy requiring employees to keep disciplinary matters confidential.

4. Respondent has violated Section 8(a)(1) and (3) of the Act by discharging employee Marcia Williams on March 20, 1997.

5. The unfair labor practices set forth in Conclusion of Law 3 and 4 affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has violated the Act in certain respects, I shall recommend that Respondent be required to cease and desist therefrom, and from like or related conduct, and to take certain affirmative action necessary to effectuate the policies of the Act. Thus, Respondent will be required to offer Williams reinstatement to her former position or, if no such position exists, to a substantially equivalent position, and to make her whole for any loss of pay and other benefits she may have suffered by reason of her unlawful discharge, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). In addition, Respondent will be required to remove from its records all reference to Williams' unlawful termination, including (without limitation) the memorandum from Ron Nitz to Williams' file, dated March 20, 1997; and to notify her in writing that this has been done and that the actions and matters reflected in these documents will not be used against her in any way. Also, Respondent will be required to post appropriate notices.

On the basis of these findings of fact and conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I issue the following recommended[32]

ORDER

The Respondent, Atwood Mobile Products, Division of Atwood Industries, Inc., Greenbrier, Tennessee, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining or communicating to employees a policy requiring employees to keep disciplinary matters confidential.

(b) Discharging or otherwise disciplining employees because Respondent believes that they have disregarded such a policy.

(c) Discharging or otherwise discriminating in regard to hire or tenure of employment or any term or condition of employment to discourage membership in International Union, United Automobile, Aerospace & Agricultural Workers of America, UAW, AFL–CIO, or any other labor organization.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative actions necessary to effectuate the policies of the Act.

(a) Rescind the policy requiring employees to keep disciplinary matters confidential.

(b) Within 14 days from the date of this Order, offer Marcia Williams full reinstatement to her former position or, if this position no longer exists, a substantially equivalent position, without prejudice to her seniority or other rights and privileges previously enjoyed.

(c) Make her whole for any loss of earnings and other benefits she may have suffered as a result of her discharge, in the manner set forth in the remedy section of this decision.

(d) Within 14 days from the date of this Order, remove from its files all references to Williams' unlawful discharge, including, without limitation, the March 20, 1997 memorandum to her file signed by Ron Nitz; and within 3 days thereafter, notify her in writing that this has been done and that the actions and matters reflected in these documents will not be used against her in any way.

(e) Preserve and, within 14 days of a request, provide at the office designated by the Board or its agent, a copy of all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary or useful in analyzing the amount of backpay due under the terms of this Order. If requested, the originals of such records shall be provided to the Board or its agents in the same manner.

(f) Within 14 days after service by Region 26, post at its facility in Greenbrier, Tennessee, copies of the attached notice marked "Appendix."[33] Copies of this notice, on forms provided by the Regional Director for Region 26, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at its Greenbrier facility since October 8, 1996.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

course of retaliation since Williams was a vocal and contentious Union supporter."

[32] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board, and all objections to them shall be deemed waived for all purposes.

[33] In the event that the Board's Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall be changed to read, "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act in certain respects and has ordered us to post and abide by this notice.

WE WILL NOT maintain, or communicate to you, a policy requiring you to keep disciplinary matters confidential.

WE WILL NOT discharge you, or otherwise discipline you, because we believe that you have disregarded that policy.

WE WILL NOT discharge you, or otherwise discriminate against you, with regard to hire or tenure of employment or any term or condition of employment, to discourage membership in International Union, United Automobile, Aerospace & Agricultural Workers of America, UAW, AFL–CIO, or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your rights under the Act.

WE WILL rescind our policy requiring you to keep disciplinary matters confidential.

WE WILL, within 14 days from the date of the Board's Order, offer Marcia Williams reinstatement to her former job or, if that job no longer exists, to a substantially similar job, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Williams whole, with interest, for any loss of pay and other benefits she may have suffered by reason of her discharge.

WE WILL, within 14 days from the date of the Board's order, remove from our files all references to Williams' unlawful discharge, and WE WILL, within 3 days thereafter, notify Williams in writing that this has been done and that the actions and matters reflected in these documents will not be used against her in any way.

ATWOOD MOBILE PRODUCTS, DIVISION OF ATWOOD INDUSTRIES, INC.